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TOWARD A SOCIAL HISTORY OF LAW AND PUBLIC EDUCATION

David Tyack*

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*David Tyack is a Professor in the School of Education, Stanford University.

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Abstract

This exploratory essay suggests the contours of a social history of law and public education. It departs from two traditional approaches to educational law: the study of landmark cases; and textbooks that delimit legally approved practice. Instead it analyzes the changing dialectic between statutory and court-decided law, stressing how Americans used the legal system in different periods to accomplish different purposes. It explores how school promoters and educational professionals used legislation to establish and standardize schools, how interest groups employed law to assert normative dominance for their own values, and how people used the courts to challenge established practices or to resolve conflicts. Through quantitative pilot studies it seeks to describe and explain changing patterns of litigation. Finally, it appraises recent attempts to use legislation and court action to promote social justice for neglected groups.

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Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is the Law.

Yet law-abiding scholars write,
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good-morning and Good-night.[1]

W. H. Auden

Introduction

W. H. Auden's judge captures the naively magisterial view of law that has, until recent years, characterized much thinking about the relation of courts to schools. Before the last generation, writing on law and education has tended to take two directions. One has been the study of landmark decisions of federal and state supreme courts that presumably "settled" disputed basic questions. That has been the scholarly high road. The second, less lofty, tradition of writing on "school law" has been the pragmatic textbook telling educators (and the lawyers they hired) how court decisions and statutes have shaped

what they must and cannot do.[2]

Auden's "law-abiding scholars" express an alternate vision of how law works as a commonplace social phenomenon. Anthropologists, political scientists, sociologists, and historians have gone beyond the written decisions of judges and the structures and processes of legal institutions to ask how law and society interact. "The legal system, described solely in terms of formal structure and substance, is like an enchanted courtroom, petrified, immobile, under some odd, eternal spell," writes Lawrence Friedman. "What gives life and reality to the legal system is the outside, social world." A social history of the law and education guided by such a perspective has yet to be written, though the work of Friedman and Willard Hurst on other aspects of legal history and the contemporary analyses of law and education by scholars like David Kirp and Mark Yudof suggest the possible contours of such a study.[3]

Why might a social history of the law and education be of interest? In the last generation there has been much writing about the litigiousness of American society, and legal activism in public education has drawn fire from critics. Yet it is often forgotten that law has always been an important instrument in shaping public schooling as well as a mirror of its goals, structures and processes. Not all groups have had equal access to legislatures or courts, of course, nor have all conflicts been defined as legal ones. The very ability to define an issue as a legal question is an important index of the

relative power of groups or individuals. The nature of the legal profession -- its concern with precedent, its opaque language -- often makes law a screen to obscure social change and to blur conflicts of values and interests. Particularly in times of social stress and structural transformation, people often employ the law to create a real or imaginary continuity with the past which may camouflage -- intentionally or unintentionally -- what is really happening. For this reason a social history of the law should attend to the politics of legalization, to whose interests are being served and whose are not. Uproar over recent litigiousness may signal, in part, concern over new and hitherto powerless actors gaining new influence.[4]

The study of law and education provides important evidence on elements of broad consensus, the power of special interest groups, and the wellsprings of conflict. State constitutional provisions on public schooling, for example, often deliberately express what their authors understand to be common beliefs. Statutory laws typically reflect the goals of organized pressure groups -- of temperance lobbies or educational associations, for example. And court challenges to laws or to the authority of educational officials often reveal dissent in a system presumed to be "above politics" -- indices that may be only the tip of an iceburg of discontent or resistance since court cases are typically expensive, time-consuming, and psychologically costly.

In this exploratory essay I suggest what might be some of the issues which a social history of the law might address. I am interested in how the functions and operation of the law -- both legislative and court-based -- changed over time and what were alternative non-legal ways of expressing consensus and resolving disputes. Statutory law and court law often worked in dialectic, I believe, and hence it is a mistake to treat them in isolation one from another. Landmark cases are surely important, but they need to be placed within the broader context of institutional history and societal values and interests, not treated as if they were the result of a hermetic legal evolution or automatically implemented in practice. A social history of the law in education needs to probe as well the origins and consequences of everyday legislation and litigation.

I am persuaded that study of the law and education can clarify questions that puzzle historians of education as well as elucidating the legal system. It can also provide useful perspectives on the current era of litigiousness in public schooling. Let me illustrate. During most of our history public education has been one of the few domains in which conflict has been regarded as unfortunate if not irrational. Consensus has been the ideological norm, based first on shared political and religious values and later on professional expertise. There has been little effort to create a rationale for controlled conflict in an institution that was supposed to be beyond controversy. Court procedures, by contrast, are

adversarial in design. So are other important social domains. The market system of capitalism is based (at least in theory) on competition, while organized labor and management vie with one another. Under the separation of church and state religious sects contend for members and for the right to define truth and morality. Political parties attack each other with ritualistic regularity and rhetorical overkill. Yet public education is supposed to be consensual and "above politics." In the last generation deeply-based conflicts that have been papered over by apparent consensus have erupted in a society marked by important divisions of class, race, religion, gender, and ethnicity. Examining the uses of the law in education provides clues to the changing politics of education, the distribution of power and privilege, and the formation of both commitment and dissent. It is an important way of mapping both past and present.[5]

This essay gives a provisional sketch of what a social history of the law and education might contain. It is not a documented monograph but an informed set of conjectures to be tested by further research.

Briefly, the argument runs in this fashion. Advocates of the common school in the mid-nineteenth century used state legislation as a mode of <u>enticement</u>, as a way to persuade through moral appeals or to attract through state subsidies their fellow citizens to establish public schools and to send their children to them. Such laws in education parallel a

broader trend, documented by Willard Hurst, to release and channel energies in economic and institutional development. State constitutional provisions and school laws constructed a framework of governance and finance for common schools. Such legislation expressed what reformers believed to be a pervasive belief system. Through such laws the crusaders reminded Americans of their duty, the educational correlates of their civic and moral convictions. The power of the state actually to enforce such laws, however, was minimal. Local citizens needed to be convinced that they should act. The main concern of leaders at both the state and local levels was to attract support of public schools in what was, in effect, a diverse buyers' market of schooling.

Toward the end of the nineteenth century a somewhat different emphasis appeared in school legislation, that of normative dominance. By then public education had become so firmly established that its only major competitor was the Catholic parochial school system (by 1880 about 98 per cent of rural students went to public schools). But people worried that the older civic and moral values -- assumed by the earlier crusaders to be self-evident to responsible citizens -- were threatened and hence the destiny of the republic clouded. Self-consciously, they turned to legislatures to give their own values what Friedman calls a "monopoly of respectability." The WCTU, for example, persuaded all of the states to pass laws requiring instruction in the evils of alcohol. Patriotic

groups anxious about social conflict or the assimilation of immigrants pressured for compulsory instruction in American principles, including flag salutes. Nativists demanded laws mandating that elementary teaching be in English only, reversing a more tolerant policy that earlier had commonly left such decisions to local communities. The new legislation reflected a breakdown of the older confidence in the force of voluntarism, a fear of pluralism, and an increasing conviction that the child was to be socialized in a manner dictated by the state and not the parents.

Professional leaders during the Progressive era onwards shared many of these concerns for proper socialization but they also pressed for state legislation to codify schooling according to their own "scientific" administrative models. They sought to standardize education by redesigning school codes and by increasing the power of states to enforce compliance. Centralization of control in city schools and state systems reflected their desire to turn educational decision-making over to experts and to widen the purview of administrative law. This era saw increased regulation promoted by the professionals themselves — for example, to consolidate rural schools. In turn, such changes weakened previous means of conflict resolution and lessened the powers of local school boards and parents.

In the years following Brown (1954) much has changed. Dispossessed groups have challenged through legislation and the courts what they perceived as an unequal and unjust system of public schools. Basic cleavages and inequities in society

have become increasingly apparent, and the law has become a new force for social change in education as in the society as a whole.[6]

These emphases in educational law -- enticement, normative dominance, codification, and challenge to the existing order -- were not mutually exclusive and successive stages. In all periods people have sought to use the law to attract support, to impose values on outsiders, to standardize schooling, and to challenge inequalities that reflected basic social divisions. Schools have always been used as a form of "social engineering" (though people did not always use that term). But relative emphases in school legislation did change in different periods.

So did the use of the courts to contest such laws. In the formative stage of the public schools few Americans took their disputes over public education to the courts. People in local communities had many ways of settling conflicts in their one-room schools, much as church members adjudicated differences in small congregations. The cases that did reach appellate courts and the U.S. Supreme Court overwhelmingly involved disputes over finances and governmental arrangements. Going to court was probably a last resort, except to enforce or contest contracts, where legal procedures were common and well-established. When dominant cultural groups used laws to enforce their values on others, however, an increasing number of citizens went to court to protest the right of the

state to intervene in matters previously left to the discretion of parents and ethnocultural groups in local communities. And when professional educators used state school codes to enforce their version of the one best system by law, the courts became a safety valve for opposition once expressed through other channels.

Throughout American history the bedrock of cases probably continued to consist of the traditional fiscal, contractual, and governmental issues, but new types of law brought new challenges. And in the last generation advocates of dispossessed groups, spurred on by major movements for social justice, began to introduce new issues of individual rights and equity that pushed the courts into fresh domains of educational policy. The dialectic between statutory and court law shaped the development of public schooling in profound ways.

1. Consensus and Conflict in the Common School Crusade

The common school crusaders of the mid-nineteenth century sought to persuade, entice, shame, frighten, and inspire their fellow citizens to support public education. They wanted to attract all to public schools -- rich and poor, native-born and immigrant, male and female, and people of different religious persuasions. They had few powers of coercion in most states and communities and relied instead on mobilizing a social movement that drew in its methods, ideology, and membership on the example of the expansionist Protestant churches of the period. During the early nineteenth century Americans were committed to

education, but their schools were a miscellany of institutions, a buyers' market in which parents chose schooling for their children and often divided on the basis of class, gender, religion, and ethnicity. What the public school promoters sought to achieve was a general commitment to a common institution, free to all, financed and governed by the public, and expressing a common denominator of moral and civic values.

To understand the use of law in this campaign it is useful to recall the cultural values and the social and political setting of the educational revival. A large number of the common school leaders believed, quite literally, that the United States was God's country (an affirmation declared on the back of the United States seal and echoed again and again in sermons and political speeches). They thought that God had selected America to be a redeemer nation and that His righteous society required proper training of the young. They assumed that all right-thinking citizens basically shared their Protestant-republican ideology and needed to be reminded of the duties entailed by that belief system. Thus when they argued for public education, they based their case not simply on instrumental political and economic values but on common assumptions about a providential plan. They sought to align the institutions and laws of man with the intent of God.

The society they addressed was primarily rural and thinly scattered, except in parts of the newly-industrial Northeast. The formal apparatus of government was astonishingly small (in

1860, there were only 2500 employees of the federal government in Washington, D.C., and as late as 1890 the median size of state departments of education was only two, including the superintendent). Traditions of voluntary action and local control were strong. The lines between private and public, sacred and secular, were blurred in formal education as in a number of other domains.[7]

Common school crusaders operating in communities across the settled states and frontiers used multiple strategies to create the public school system. Like ministers building churches or reformers arousing citizens through voluntary associations, they relied heavily on appeal to common religious and socio-political ideals. They sought action based on shared conviction. State constitutions and statutes provided one kind of idealized framework for this mobilization at the local level. Many of the early hortatory preambles to constitutional provisions for education expressed the values that comprised, they thought, this agreement on cultural values. Over and over again they declared that intelligence and virtue were necessary for the stability of republican government and the preservation of the rights and liberties of the people, that political wisdom, morality, and religion were inextricable. Often state constitutions or statutes specified the virtues the schools should inculcate in the young (a mix that Benjamin Franklin, William McGuffey, and the Boy Scout oath have rendered familiar): patriotism, order, temperance, piety, kindness, chastity, cleanliness, industry, and honor, among others. The moral order,

the crusaders believed, was not subject to debate but grounded in God's will and republican principles. Law should express this consensus.[8]

Although moral exhortation was the main form of enticement, constitutions and laws also took advantage of monetary inducements and local rivalries. Laws established a framework for creating, governing, and financing local districts (or ratified them where they existed already). But in an era when states had weak or non-existent machinery for actually enforcing the laws, much depended on local initiative. Districts could receive apportionments from state or county school funds only if they met the (minimal) state regulations, and the strong force of neighborly competition between townships or settlements to secure those funds impelled many to action. Laws in sparsely settled states or territories were often framed to stimulate such emulation. But school codes described ideals as much as prescribed penalties and rewards. The state superintendent was expected to inspire teachers with the latest pedagogical methods, to rouse the citizens to build better school houses, and to try (as best he could) to create a uniform system.[9]

Montana is a case in point. Arthur C. Logan, Superintendent in 1887, took pride that the territory spent an average of $1,000 for each of its 289 school districts, almost $20 for each child between the ages of six and sixteen -- the highest per capita in the nation. "The public," he wrote, "is the most powerful agency . . . in working out the salvation of the

schools . . . ." As he travelled about from county to county, he spoke at teachers' meetings and to citizens (often in the Methodist Church of the county seat). After speaking on "Necessity of moral character being developed in the public schools" in Missoula, for example, he wandered "from his subject for a few moments to inform the citizens . . . that they were not doing all that could be done to aid the great work of education."[10]

The school laws provided a blueprint to the local citizens for a uniform system of common schools: free, universal, public in support, and unconstrained by sectarian and politically partisan influence. The public, not the bureaucrat, was the real keeper of the model. In Nebraska the 1877 school code bore in bold letters in its back cover:

> THIS VOLUME IS PUBLIC PROPERTY
>
> It is to be kept in the custody of the school officers, and produced by them at all meetings of the district, for consultation by the voters. . . .[11]

In this public philosophy of schooling, the law was not the esoteric domain of the professional but a guide accessible to the people who actually built the system: local citizens. Like law in many other fields -- land entitlements, business contracts, incorporation -- educational law was designed in large part to release and channel energy, not to curb it.

Conflicts clearly did arise over public schools all across the nation, despite the reformers' desire to base public education upon consensus. Local citizens quarreled about

who was to run the schools, how, and to what end; about district boundaries and tax rates; about contracts; about questions of religion and partisan politics; and about a host of other issues. But relatively few of these conflicts ended up in court.

The appendix to this essay describes a foray into quantitative analysis of issues litigated in courts during the nineteenth century. The authors of that appendix and I are quite aware of the limitations of this preliminary study. We rely on the categories of analysis of the lawyers who compiled the Centennial Digest for the West Publishing Company, and these categories may reflect more the professional concerns of lawyers of the time than the present-day interests of social historians. No one knows to what degree reported appellate cases are a representative sample of all court cases. But bearing these cautions in mind, and recognizing that this broad analysis should be supplemented by careful state and local studies of court records, we present some of our findings in Table 1 and Figure 1.

There are some tentative observations and hypotheses one may draw from the data and some lurking puzzles. The first observation based on Table 1 is that the absolute number of litigated issues is small. The entire nineteenth century

Table 1

DISTRIBUTION OF LITIGATED ISSUES PERTAINING TO SCHOOLS, BY TYPE OF ISSUE AND BY DECADE

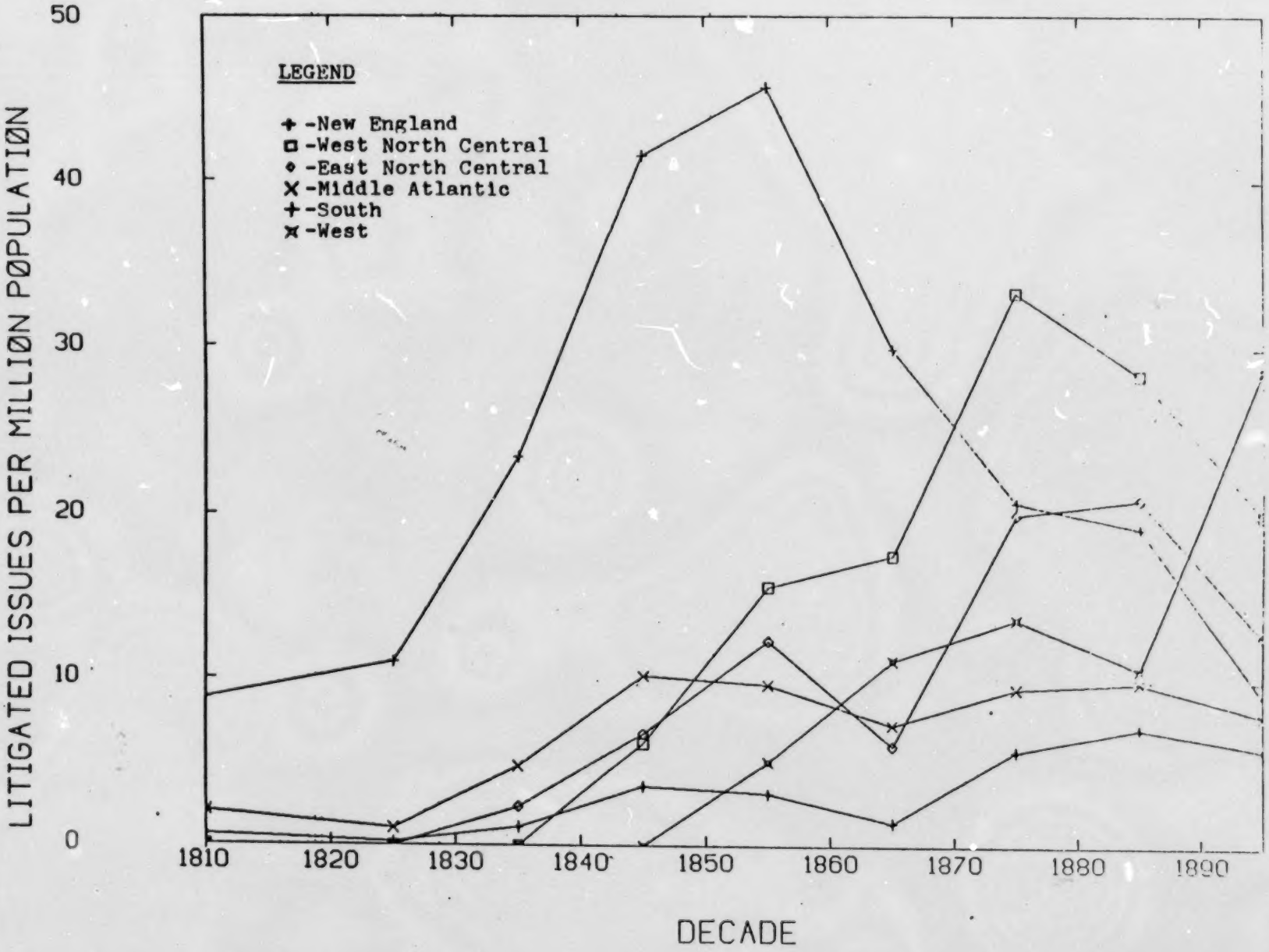
(Number of Issues in Parentheses)

Type of Issue	Before 1820	1820-1829	1830-1839	1840-1849	1850-1859	1860-1869	1870-1879	1880-1889	1890-1896	Totals
Finance	63.2 (12)	60.9 (14)	43.8 (35)	45.5 (97)	52.0 (166)	45.8 (146)	47.7 (305)	49.5 (409)	45.9 (339)	47.8 (1523)
Governance	31.6 (6)	34.8 (8)	50.0 (40)	48.4 (103)	40.0 (130)	43.3 (138)	41.3 (264)	38.1 (315)	39.2 (289)	40.6 (1293)
Other*	5.3 (1)	4.3 (1)	6.2 (5)	6.1 (13)	8.9 (29)	10.9 (35)	11.0 (70)	12.3 (102)	14.9 (110)	11.5 (367)
Totals	0.6 (19)	0.7 (23)	2.5 (80)	6.7 (213)	10.2 (325)	10.0 (319)	20.1 (639)	26.0 (826)	23.2 (738)	100.0 (3182)

*Other includes the selection and appointment of teachers, their removal and discharge; the admission and attendence of pupils, their classification and pupil discipline and instruction.

FIGURE 1. EDUCATIØNAL LITIGIØUSNESS BY REGIØN*

*See appendix for state listings within regions.



produced fewer cases than did most of the separate decades of the twentieth century (I shall return to this later). Second, the court volume of school litigation increased over time (the last column, on the 1890s, covers only the years 1890-1896). Third, almost 90 per cent of issues dealt with finance and governance (for the categories included, see the appendix). Fourth, the category we list as "other" increased over time to 15 per cent in the 1890s; this includes what the lawyers listed under such rubrics as private claims against districts, teachers (appointment and removal), and "Pupils and conduct and discipline of schools."

Figure 1 standardizes the rates of litigation by population and plots those rates over time by census regions. The variations suggest some hypotheses. First, the pattern of a steep rise in rates of litigation followed by drops in New England and the North Central states (parallelled to a degree by the Mountain and Pacific states) suggest a rough correlation between legislation establishing school systems and challenges in the courts, varying over time as the common school moved westward. Second, the relatively high rate of litigation in the early years of the common school crusade may have set legal precedents and clarified certain kinds of issues when later states established their own systems (it was common for western states to copy eastern constitutional provisions and statutes). Third, the very low rates of litigation in the South suggest a quite different political-legal culture as well as retardation in the

growth of public education in that region. A number of puzzles remain, however. Why, for example, did rates of litigation remain relatively low and stay more nearly on a plateau in the Middle Atlantic states, where population density was relatively high and school systems established at an early date? Why did rates of litigation drop in the 1870s in the Pacific states and then rise sharply after 1885?[12]

Such descriptive statistics based only on appellate cases and clued to lawyers' categories clearly raise as many questions as they settle. Only careful case studies of court records in diverse states and regions, placing the analysis within a careful explanation of the legal structures and processes and educational character of each, can pinpoint the meanings of these macro statistics. But the paucity of appellate cases does suggest that it took a strong motive -- most often a monetary one -- to push Americans into the courthouse over educational disputes. Even the few (seven) school cases that found their way into the U.S. Supreme Court were overwhelmingly fiscal in character during the nineteenth century; with one exception, they primarily involved bonds and taxes (one wonders, in fact, how most of them even were considered substantive federal issues). Whole domains of individual rights and equity as well as the internal operation of the schools that later became important themes of higher court decisions were generally not defined as legal issues.[13]

As Lawrence Friedman points out, average Americans of the

nineteenth century generally did not seek redress of grievances in court. Litigation became increasingly costly, often decisions were delayed by logjams in the courts, and legal processes seemed technical and impersonal (and associated in the minds of many with crime). The mutual interdependence of people living in small communities probably also discouraged litigation. During the entire nineteenth century there were only four cases involving compulsory school attendance, for example. A school official in Nevada suggested why: in the rural sections of his state the compulsory law "is a dead letter, and will remain so as long as the initiative for the enforcement is in the hands of the trustee. They simply will not swear out warrants for the arrest of their neighbors."[14]

Americans in local communities did have a particular legal recourse other than the courts, however, if they did not like the general laws their legislatures passed. They could and did -- in large numbers -- go to their state legislatures to secure new and special laws adapted to their own local needs. They could ask their own representative to introduce special acts that enabled them to change the rules for electing school directors, alter school boundaries, borrow money, build schoolhouses, and accomplish many other purposes. From 1851 to 1855 the Ohio legislature passed 228 such acts; by 1873 they totalled 982. Legislatures in many other states proved to be similarly responsive to local influentials. Before the movement to establish uniform school codes in the Progressive era, therefore,

when such special acts were condemned as "weeds in our legislative garden," local people who disliked general laws could secure a special dispensation, could settle local disputes by going to the legislature, or could secure legal authorization for new bond levies or taxes. Such state actions were quite consistent with a nineteenth-century philosophy of local control and encouragement of local initiative, but not with the philosophy of a one best system enforced by the state.[15]

The most prevalent and important conflicts over public education in the mid-nineteenth century were not battles between state authorities and local officials -- for the "system" of public schools was very loosely articulated -- but rather controversies that arose within communities (and between neighboring communities, for local rivalries were common). They argued over which teacher to hire or fire (ability to discipline was often an issue -- was the teacher too harsh or soft?); whether to read the Bible, and if so, which version; whether to permit teaching in foreign languages; whether to raise taxes or lower them, what kind of schoolhouse or facilities to provide; what textbooks to use; when to open and close school -- important in agricultural communities that needed childrens' labor; who should get contracts for goods and services; and the list goes on.[16]

People had many other ways of avoiding, settling, or aggravating their quarrels, quite apart from courts or legislative appeals. They could elect new school trustees who agreed with

their views. They could take a dispute to a respected member of the community -- often a minister, accustomed to controversy in his church -- to mediate. Sometimes a faction might simply solve the matter by force, as when a group of Iowa farmers moved a schoolhouse a mile by oxen one night because they did not like its location. If parents did not like a school policy or a teacher, they could simply withdraw their children. And in the highly mobile society of the nineteenth century, Americans could decide to move on to a new community where the schools were more to their liking.[17]

What is more striking than conflict in the mid-nineteenth century public school is the relative agreement that prevailed in most communities, however. People accustomed to competing in religion, in party politics, and in economic life found enough common ground of values and interests to build together a common school system. In this process the enticements of law played a part, by expressing common aspirations and authorizing a structure of governance and financial reward for compliance. The courts offered a safety valve for some to resolve conflicts. But litigation remained at the periphery of the campaign, not the center.

2. <u>The Quest for "Normative Dominance"</u>

In the last quarter of the nineteenth century, when the public school became well established as the mainstream of elementary education, there was a gradual shift in state legislation from enticement to coercion, from trying to persuade all

groups to support the common school to using it as a tool for certain groups to achieve what Friedman calls "normative dominance," to give particular values the authority of law. In various domains -- religion, temperance instruction, history and civics, and language policy -- interest groups claiming to be a moral majority prevailed on legislators to codify into law their own version of true Americanism, sober character, and pan-Protestant moral certainty. Worried about what they took to be declining consensus on the earlier Protestant-republican ideology, dismayed by urban ills, concerned about assimilation of new immigrant groups, fearful of sectional and class conflicts, organized WASP pressure groups prevailed on states to pass laws that gave them a "monopoly of respectability" in their competition with other status groups. World War I provided an especially favorable political climate for this drive towards homgenization through education; many of the new laws were passed during the second decade of the twentieth century.[18]

"Normative dominance" was, of course, not a new phenomenon. Value-free schooling is an impossibility. Even a highly pluralistic form of education that fosters appreciation for diverse cultures and opinions is itself based on a particular ethical vision and attempts to socialize children to tolerance and appreciation of difference. The founders of public education clearly wished their values to prevail in the classroom. But during the middle of the nineteenth century many issues that divided the larger society were presumed best solved by local

public authorities or left to voluntary moral suasion. Often school promoters wished to avoid divisive questions in the interest of finding a consensus in which all could share. Mostly Anglo-Saxon Protestant and native born, exemplars of Victorian morality, they assumed that all other responsible people would share their advocacy of Bible reading without comment, civic instruction, teaching about the evils of alcohol and tobacco, and the need to Americanize the foreign-born. It was generally not necessary to legislate on such matters but simply to remind others of self-evident moral and civic truths. Rarely did such matters become subjects for state legislation or authoritative determination by the courts before 1870.[19]

Towards the end of the century and during the Progressive era, however, certain ethnocultural groups decided that they should enforce their values on others in public education through legislation. Americans who believed that the United States was not only God's country but also <u>their</u> nation -- mostly native-born Anglo-Saxon citizens of pietist Protestant persuasion and respectable station -- decided that their preferred future required the force of state sanction and that they could no longer rely on voluntary action or on unself-conscious consensus. Some historians see such reformers as "status-anxious" groups who perceived themselves slipping in relative rank; others see them as confident and mobilized members of social movements out to reshape society to their specifications. My own view is that their motivations were a complex but not incompatible mixture of fear and hope, the world-view expressed

in the best-seller of evangelical reform by Josiah Strong, Our Country.[20]

Religion was a major arena of ethnocultural conflict in education. A lawyer in the Cincinnati Bible case in 1870 described what later scholars have called "status-group conflict": "In my judgment, the contest is not about religious education at all. It is about denominational supremacy, the right to be higher, to be better, to be more powerful than your neighbor." Most of these disputes were fought out in local communities without recourse to the courts or legislatures; indeed, sometimes they led to pitched battles in the streets between Protestants and Catholics. Typically, arguments over religion were not perceived so much as issues of constitutional rights as they were tests of sheer power -- who had the majority? Beset by such conflict, school people often preferred a watered-down pan-Protestant moral teaching rather than a decisive legal solution that might alienate important factions, and in most communities teachers did employ prayers and read the Bible.[21]

When contestants in local communities did take religious issues to courts -- normally over the use of the Bible -- the decisions usually favored majority rule over individual rights of conscience. In a study of 25 cases in 19 states from 1854 to 1924, Otto Hamilton found that three-fourths of the protesters lost (three-fifths of these complainants were Catholic). The chief argument used in favor of religion in the curriculum was that it was essential to the teaching of morality and therefore to the preservation of the state.[22]

Although only Massachusetts had required the reading of the Bible during the nineteenth century, after 1913 ten other states and the District of Columbia passed such laws. Typically such laws specified that the Bible should be read every day, and some provided penalties for failure to comply (in Pennsylvania, teachers who did not read the Bible were to be discharged, while state funds were withheld elsewhere). A total of 36 states passed legislation during the twentieth century permitting or requiring the reading of the Bible, while some states forbade the teaching of evolution or otherwise specified religious orthodoxy. Once transmitted in an unselfconscious way in homogeneously Protestant communities, religion became in the early twentieth century a matter for legislation by evangelical interest groups. The language of the preamble to the Maine Bible law claimed that religious instruction was needed "to ensure greater security in the faith of our fathers, to inculcate into the lives of the rising generation the spiritual values necessary to the well being of our and future civilizations." What had once been safely left to voluntary action now seemed so endangered that the state must act.[23]

A similar pattern appeared in the work of temperance advocates. Earlier in the nineteenth century prohibitionists had relied heavily on private associations and local efforts to promote their cause. Towards the end of the century, however, the Women's Christian Temperance Union lobbied so successfully for state laws and a national law of 1886 that by 1903 all

states and territories required instruction (often misleading indoctrination) about alcohol. Many of the laws were highly specific and contained strong sanctions. The federal law dealing with schools of the District of Columbia and all the territories, for example, required the discharge of any teacher who did not comply (and one can be sure that chapters of the WCTU kept an eagle eye on the local schools). Other laws prescribed that teachers must pass tests on alcohol or narcotics to obtain their certificates, described what must be covered in lessons, and demanded that officials report on how the laws were carried out in their districts.

In Alabama the WCTU made no effort to disguise its role: a provision of the 1919 law required that "directors of the State normal schools shall arrange with the president of the Women's Christian Temperance Union to have a trained scientific temperance institute worker visit each normal school of the State at least once a year, and to be allowed one hour per day on not less than three days to lecture before the student body"; in addition, the WCTU controlled the content of "the exercises of temperance day to be observed in the public schools of the State one day in each scholastic term." The WCTU needed no lessons on how to gain political influence or how to implement social legislation. It offered the perfect example of how a mobilized social movement could achieve "normative dominance" through the public school curriculum. I have not discovered any court challenges to instruction in "temperance."[24]

Impelled by a similar certainty about public evils and the need for educational solutions, other private groups pressed for mandatory instruction in American history and civics. These state laws reflected concern for national unity inspired by wars and worry about radicalism and the assimilation of immigrants. In 1887 the Grand Army of the Republic demanded instruction in government in order that "loyalty, patriotism, and obedience to constituted law should be diligently impressed upon the minds of all our children." A major vehicle for inculcating patriotism was United States history, required in 30 states by 1903. The American Bar Association lobbied so successfully to require teaching about the American constitution that by 1923 twenty-three states prescribed the subject. Many states required teachers and pupils to pass tests on the national and state constitutions and prescribed penalties for school officials who failed to comply.[25]

Legislation on flag salutes and ceremonial uses of the stars and stripes exemplified the doctrinaire character of such socialization in civics. New York enacted the first requirement of a flag salute the day after the Spanish-American war began, soon joined by three other states; six states mandated flag salutes as a result of World War I. Almost all states required the ceremonial display of the flag in public schools, sometimes specifying its size and material and even the height of the flag pole.[26]

Another important kind of state legislation -- one that

aroused great political controversy between ethnic groups in the latter two decades of the nineteenth century -- concerned language policy, especially compulsory instruction in English. During the mid-nineteenth century such decisions were customarily left to local communities, following a tradition established early in the nation's history of not legislating about language. When states like Wisconsin and Illinois passed laws in 1889 outlawing instruction in foreign languages, immigrant groups reacted strongly at the ballot box and overturned the legislation. Fear of unassimilated immigrants and radicalism at the end of the century and during World War I, however, strengthened the power of assimilationists. By 1903 fourteen states required public elementary schools to teach only in English, a number that swelled to 34 by 1923. During the War the National Security League also campaigned actively against the teaching of German in both elementary and high schools; partly as a result of their efforts, enrollments in high school German classes fell from 24.4 per cent of students in 1915 to less than one per cent in 1922.[27]

There were few court cases challenging this compulsory instruction in patriotism and new language restrictions, just as there were few questioning the ceremonial uses of religion in public education. Some cases -- including the landmark decisions of Meyer v. Nebraska (1923), Pierce v. Society of The Sisters (1925), and West Virginia State Board of Education v. Barnette (1943) -- did test the limits of coercion. What is

striking in retrospect in these cases is the large zone of discretion still allowed legislators and public school officials in Meyer and Pierce and the tardiness of the reversal of earlier state and federal flag salute cases in Barnette. While these decisions may be read as charters of freedom, what is often not stressed is the very wide domain of normative dominance still permitted to those who wished to define truly American instruction. It is this historical perspective rather than later, more liberal, uses of the decisions that I wish to explore here. Subsequent lawyers quoted libertarian sentiments from these decisions -- the advocates' habit of seeking friends in the crowd -- but one needs to examine what was left untouched by Meyer and Pierce as well as what was challenged.

The Meyer case resulted from a Nebraska law forbidding teaching in any language other than English to children below the ninth grade. It was one of the many such statutes passed during the anti-German and 100 per cent American climate of the war years. The plaintiff was punished for teaching a ten-year-old boy to read German. The attorneys for the state of Nebraska used arguments for the ban that were common at the time. "The purpose of the statute is to ensure that the English language shall be the mother tongue and the language of the heart of the children reared in this country," they told the Supreme Court. "It is within the police power of the state to compel every resident of Nebraska so to educate his children that the sunshine of American ideals will permeate the life of the future

citizens of the Republic." Many other states have done the same without successful challenge, they argued, for self preservation of the state "corresponds to the right of self-preservation of the individual." Lawyers defended Meyer by contending that the statute denied him equal protection of the law when it denied him the exercise of a legitimate calling.[28]

The Supreme Court based its decision in Meyer primarily on that relatively narrow ground -- that it interfered with the pursuit of a lawful occupation without any compelling public necessity. The Court recognized "the desire of the legislature to foster a homogeneous people with American ideals"; what it rejected was the means, which infringed on the rights of the plaintiff. The Court did not question the fundamental right of the state "to improve the quality of its citizens, physically, mentally and morally" nor did it seek to limit the legislature's "power to prescribe a curriculum" or "the power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English." Thus by implication the Court allowed the state very large discretion short of this specific clause, despite its rhetorical support for individual rights (which encouraged later liberals to regard Meyer as a blow for liberty).[29]

The Pierce decision of the Supreme Court upheld the right of parents to send their children to private schools. Again the Court based its findings chiefly on the relatively narrow

grounds of the property rights of private school educators even though it also referred to "the liberty of parents and guardians to direct the upbringing and education of children under their control." In 1922 the voters of Oregon had passed an initiative that required children to attend public schools. The chief organizers of that campaign were the Oregon Scottish Rite Masons and the Ku Klux Klan. Their targets were groups they defined as deviants from their approved version of Americanism: Catholics, immigrants, and elites who escaped the benign influences of the common school. Public school people supported the law in solid phalanx. The affirmative argument on the ballot put the argument against pluralism in familiar language:

> Our nation supports the public school for the sole purpose of self-preservation.
>
> The assimilation and education of our foreign-born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.
>
> We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
>
> Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are still plastic, and finally bring out the final product--a true American.[36]

The Court ruled that Oregon had no power "to standardize its children" by requiring parents to send children to public schools only." Pierce has thus offered a useful precedent for friends of pluralism and individual rights in education, for

it showed the outer limits of considering the child as "the mere creature of the state." But it is important to recall that in Pierce as in Meyer large domains of state police power and "normative dominance" were left unquestioned: regulation of all schools, public and private; compulsory schooling; and laws decreeing "that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[31]

Indeed the flag salute cases that culminated in Barnette indicate how firmly embedded was the assumption that the need for national unity transcended individual rights. Jehovah Witnesses objected to the flag salute on religious grounds, believing the flag to be a "graven image." In Minersville School District v. Gobitis (1940) the U.S. Supreme Court upheld several state court decisions beginning in 1937 that regarded refusal to salute the flag as punishable insubordination. The Court admitted that the salute violated the religious convictions of parents and children, but it claimed that "the wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment . . . the courtroom is not the arena for debating issues of educational policy." Gobitis reflected a long tradition of judicial non-intervention in compulsory civic socialization. It affirmed many state court decisions that took the side of school authorities in student rights litigation.[32]

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The decision in West Virginia Board of Education v. Barnette (1943) -- reversing Gobitis on the constitutionality of the compulsory flag salute only three years later -- marked a sharp departure, one that foreshadowed the far more activist stance of the U.S. Supreme Court in favor of individual rights in the years following Brown v. Board of Education (1954). The Court declared in Barnette that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[33]

In their eloquent characterization of history the Justices were evidently not thinking of children in public schools, who had, of course, precisely been subject to court-approved prescriptions of orthodoxy in "politics, nationalism, religion" and other domains like temperance.

When the public schools had been well established, they were a ready target for politically potent groups that wished to write laws to inculcate their version of truth and virtue on the rising generation. Once on the books, such legislation was rarely challenged successfully in the courts, though sometimes it was reversed through electoral politics, as in the case of the language laws in Illinois and Wisconsin. Since it was easier to exercise normative dominance on the captive

audience of the young than on adults, WASP citizens found it more feasible to shift the burden of reform to the next generation, to define problems as educational rather than as injustices or evils calling for immediate action. In the process conflicts arising from differences of class, race, gender, ethnicity, and religion became defused and postponed. The fact that schools were presumed to be "above politics" merely disguised the origins of political conflict over public schooling and the ethnocultural and class sources of demands for normative dominance. Not until the last generation would excluded groups achieve the voice and power to challenge the results of this earlier legalization of orthodox values, and then their efforts would be labeled litigiousness partly because they came from people who had traditionally lacked power. The values of those who had power seemed self-evidently correct.

3. Codification of the One Best System in the Twentieth Century

Statutory and administrative law were major means of educational reform employed by professional leaders in public education from the Progressive era onwards. These reformers, whom I shall call the administrative progressives, were a cohesive group of university education professors and deans, leading city and state superintendents, foundation executives, and other administrators who had a new vision of how to create a differentiated, centralized, and "socially efficient" system of schooling.

More than any other one group, the administrative

progressives transformed the character of public education during the twentieth century, often in alliance with business and professional elites. They sought to change the locus and process of decision-making by abolishing the older decentralized mode of school governance and putting in its place a more centralized system in which lay boards deferred to professionals. They wished to legitimize governance by expertise -- by the new canons of "scientific management" -- rather than by popular participation. They increased the scope and complexity of city and state school systems until they became large pedagogical conglomerates, patterned in many ways upon the new business corporations. While they sought and won power for the professional, they believed that educators were not just another interest group but experts who understood and served the public good. Their ideal was to replace "politics" by "administration."[34]

The administrative progressives, by and large, had an ambivalent attitude toward normative legislation sponsored by lay groups. The new educational leaders were themselves mostly from small-town pietist backgrounds and uncritically accepted WASP cultural values. They were concerned about the assimilation of immigrants, patriotic instruction, and eliminating foreign languages as a medium of instruction. Leaders in the National Education Association enthusiastically supported temperance instruction and prohibition. School chiefs in local

districts -- the school superintendents -- were typically native-born Protestants who regarded church and school as twin museums of virtue. But the administrative progressives also believed that the design of curriculum should be the province of professionals and that pressure groups should be kept at arm's length. The dean of Teachers College, Columbia, complained, for example, that "some school boards will sit in judgment on history texts and some will bar modern science. The war taught us that German could be eliminated from our schools. Who knows what labor unionists, or chambers of commerce, or Biblical fundamentalists will insist on next."[35]

Professional leaders wanted to use state legislation not so much to prescribe virtue as to codify and enforce their version of a new standardized and expanded educational system. How to use the political processes of state legislatures to accomplish the purpose of creating a "non-political" one best system was a bit of a puzzle. One administrative progressive complained that "No one having the slightest acquaintance with the ignorance, selfishness, greed, partnership, logrolling and hamstringing to be found in the average legislature, can have any great respect for all provisions of law simply because they happened to be passed by the legislature." Indeed, codification was to clear away the underbrush of obsolete, over-detailed prescriptions that tied the hands of educators, to abolish special legislation that prevented state-wide uniformity, and to place the schools beyond the reach of special interest groups, small-minded rural legislators, and machine politicians.[36]

In his influential book State and County Educational Reorganization, an up-to-date new education code for the fictional "state of Osceola," Stanford's Ellwood P. Cubberley described the new covenant in education, circa 1913 (there is some evidence that Osceola was Indiana and that his code was put into effect in that state during 1913-14). In his preface Cubberley described the right kind of legalization of education -- one that matched the aims of the new scientific managers in education and increased their power. What he wanted was a constitutional article on education that would state general goals and establish structures of governance and finance. The school code, in turn, should mandate patterns of administrative organization, school programs, funds and their apportionment, school buildings, health and sanitary requirements, the training and appointment of professionals, state oversight of the system, and considerable discretion for administrators at the state, county, and city levels to devise appropriate administrative law. Underlying it all was a commitment to administration as a substitute for "politics":

> The essential features of this Constitution and Code are a strong and useful state administrative educational organization. . .; the county-unit of school organization and administration, with a business and professional organization. . .; the abolition of the outworn and obstructive district system; the elimination of party politics from the selection of expert educational officers, election to and retention of these positions being based on merit and efficiency; the concentration of authority with and responsibility on these experts, both in the cities and in the county-districts. . . .[37]

What Cubberley and his fellow school code reformers wanted was a complex mixture of centralization of certain functions by the state together with professional autonomy for superintendents in the county districts and cities (some educators later complained that Cubberley hemmed in the experts by too much statutory detail). The state legislature should use "a perfectly definite yet somewhat complicated scheme for the apportionment of funds . . . to stimulate and reward effort, and to penalize inactivity"; should require higher standards of certification and in-service education for professionals; and should see that compulsory attendance is enforced. The code should reflect the best professional knowledge available and employ strong sanctions in standardizing schools according to expert blueprints.[38]

The administrative progressives used a variety of political-professional strategies in persuading state legislatures to amend or codify school statutes. Foundations and United States Office of Education sponsored state school surveys which employed experts to compare existing educational laws and practices with their version of an up-to-date system of schools. University education professors and deans served as advisors to state commissions on educational reorganization. National and state educational organizations -- especially those affiliated with the National Education Association (NEA) -- lobbied effectively with the professionally-designed legislation. The staff of the Research Division of the NEA, for example, provided state affiliates with digests of progressive school laws and assisted

in political strategy, urging them to design comprehensive reforms in advance, to use experts as advisors who based their recommendations on research, to profit by the experience of other states, and to present their demands as a united front of professionals. This was, of course, a political strategy and one that reflected their own interests, but it was disguised in the language of disinterested expertise:

> Generally speaking, experience seems to show that it is unwise to enter into any form of alliance, concession, or bargain to secure the passage of school legislation. 'Be sure you are right, then go ahead' is a good motto for a program of school legislation. When the school people begin to bargain, they weaken their fundamental position.[39]

Of all groups who tried to influence state educational legislation during the twentieth century, public school people (organized in their state educational associations) were the most influential. They had a direct and personal interest in securing better funding, tenure laws, certification requirements restricting entry, better school buildings, expanded structures and content of schooling, greater scope for professional discretion, and consolidation of small schools. They did not always agree on legislation, of course; some rural school people, for example, opposed the unification of districts. Educators dissented among themselves about how specific laws should be, given the flux in social conditions and concepts of what constituted good education. Some approved of normative legislation on temperance instruction and using English as the only medium of elementary instruction, while others did not. But

by and large they could agree on what constituted appropriate codification of school law.[40]

Partly because they had themselves designed and lobbied for the new legalization of education, educators were effective in implementing the laws in the schools. Compulsory attendance regulations were a case in point. During the nineteenth century school people were ambivalent about laws requiring all children of a certain age to attend school. Such laws were often passed without their strong support and were more symbolic than practical in their effects -- a stamping of the foot by virtuous citizens who sent their children to schools and who demanded that other less conscientious parents should do likewise. But there were few effective ways of implementing the laws in most states until the twentieth century. During the Progressive era, however, school leaders joined child labor reformers and labor unions in securing the passage of strong legislation, and the administrative progressives created elaborate "pupil personnel" departments with truant officers and other means of tracking errant youth and bringing them into schools. Justices of the peace and juvenile courts supplied the sanctions of law when necessary. The new educational experts were effective administrators who knew how to design and implement legislation, particularly when they believed that they -- and their schools -- stood to benefit from it.[41]

Standardization of rural schools by carrot and stick techniques provided another example. In the twentieth century, it

became a common practice for state legislatures, state boards of education, or state superintendents by administrative law to require rural schools to comply with state standards before they could receive state funds. By 1925 thirty four states reported that they had standardized 40,000 local schools. No detail was unimportant. Administrative reformers George Strayer and Nicholaus Englehardt of Columbia created score cards for country schools that rated them on their window shades, the color scheme of floors, the presence of globes and dictionaries sanitary drinking cups, and the types of toilets they had. Like standardization, accreditation of schools enabled the administrative progressives to determine what was normal.[42]

Some educational leaders were not satisfied with the piecemeal character of state-by-state legal codification and implementation of their ideas. Charles H. Judd of the University of Chicago, for example, believed that only a strong Federal Department of Education could bring order out of chaos in public schools. In 1921 the Education Committee of the U.S. House of Representatives reported favorably on the Smith Towner Bill that would have created such a Department and would have authorized large federal sums for correcting illiteracy, educating immigrants, improving health of schoolchildren, training teachers, and subsidizing teachers' salaries. Opponents feared federal intervention into local districts and nationalization of schooling by zealous bureaucrats, using language that might have come from President Reagan. But for Judd such centralization and uniformity was precisely what was needed:

> communities have not been able to control their schools adequately. There has been a steady growth throughout our national history toward centralization in the states. . . . the states have not succeeded in matters so fundamental as teacher training or mastery of illiteracy. Centralized control of even an extreme form can be boldly advocated when attention is drawn to the inadequacy of present-day local and state efforts.[43]

This attempt to create a Federal Department of Education failed, but educators and their allies were successful in most states in using law to enact their version of progress. Statutes altered governance and finance, added new subjects to the curriculum, mandated the consolidation of schools and the transportation of pupils, required higher and higher levels of certification, and extended public education into new domains like public health and vocational training and placement.

In the nineteenth century, as I have suggested, citizens and parents had many ways to settle disputes over public schooling outside of the courts. As state laws extended their scope and state and local bureaucracies grew more efficient, however, the means of recourse narrowed. Educational officials had more incentives to implement laws and more sanctions to punish dissenters. The decline of popular participation in educational decision-making gave local administrators greater autonomy in making regulations and exercising professional judgment. The courts loomed larger, then, as a means of redress of grievances than in the past. During the nineteenth century, as we have seen, there were only about 3000 cases appealed in state courts. During the next decades the state cases mushroomed:

1897-1906: 2,289
1907-1916: 3,038
1916-1926: 4,420
1926-1936: 6,257
1936-1946: 5,456
1946-1956: 7,091 [44]

Although there have been studies of landmark decisions and surveys of court cases in particular domains -- curriculum or transportation, for example -- there are many questions unanswered about the use of the courts in the period from 1900 to Brown. Who brought suit and why? What kinds of cases remained relatively constant in proportion and what changed? What were the uncharacteristic "out-of-time" cases that were harbingers for later developments in fields like individual rights or desegregation? How did the case load in the courts correlate with new school legislation? How did regional or state variations in political culture and legal systems help to explain different rates of litigation?

A few preliminary studies hint at answers to some of these questions. Who brought suit? Thomas Griffin and Donald Jensen collected data on plaintiffs in appellate and Supreme Court cases in California. For the period from 1900 to 1949, they found, 76.5 per cent of the plaintiffs were private individuals; 14.8 per cent were school districts; and the other eight per cent were scattered among private companies, the state, counties, cities, and one private organization. What were the cases about? Most of the 383 California cases for those years involved personnel issues (39.4 per cent), various kinds of fiscal questions (22.7 per cent), governmental issues (15.4 per cent), tort

liability (14.3 per cent), and a few cases on teacher credentials, textbooks, individual rights, and desegregation.[45]

There seemed to be a correlation between certain kinds of new legislation and litigation. In the 1930s, for example, the California Legislature passed controversial new teacher tenure laws and liability laws. The jump in personnel cases from the 1920s to the 1930s was 20 to 73, and the rise in tort cases was 2 to 34. A similar kind of correlation appears to have emerged in four other states that accounted for one-quarter of all national cases reported in the mid-1930s. These states were Kentucky, Arkansas, Oklahoma, and Texas, all of which had passed laws to foster consolidation of schools, a most contentious issue to local authorities.[46]

Recourse to the courts had many purposes. In the twentieth century school districts increasingly used the judicial process to enforce compulsory attendance. Laws on contracts and tenure gave new rights of due process to teachers. Consolidation statutes created conflicts between levels of government to be settled in the courts. New entitlements such as right of transportation to schools brought parents into courts to claim benefits for their children. There was a good deal of litigation on busing in the 1920s and 1930s -- 80 reported cases on pupil transportation between 1926 and 1936 nationwide, for example -- in which parents demanded a place on the bus for their sons and daughters (I have found none in those years in which they <u>opposed</u> busing). The increased regulation of schooling by the state, the expansion

of the scope of the curriculum and elaboration of new structures, and the greater jurisdiction of professionals through increased administrative law also created conflicts with parents that took the form of litigation.[47]

For the most part, the judiciary proved to be highly deferential to the authority of legislatures and school officials when their new powers came into conflict with the desires of parents. Parents usually lost when they challenged compulsory attendance, new curricular or health requirements (such as vaccination), harsh discipline, and seemingly arbitrary regulations controlling pupils or the course of studies. In the nineteenth century the courts typically sought to uphold the dignity of the lone teacher confronting the rural community (though often cautioning the teacher to be tactful and moderate, lest community members take vengeance into their own hands for real or imagined abuses of power). In the first half of the twentieth century, judges largely ratified the centralization of authority in increasingly bureaucratic structures of schooling. One analyst of parental rights observed that the new statutes, administrative regulations, and court decisions produced a situation in which the parents "may not decide what school they wish their child to attend; whether or not the distance to school is so unreasonable or the way sufficiently dangerous to require transportation; at what age their child should begin school; what subjects he will study once he is in school and from what texts; how long he should continue his education; under what circumstances

they may withdraw their child from school." The child was indeed becoming legally more the creature of the state than of the parents.[48]

From increased litigation emerged a new specialization in law and in the professional preparation of school administrators: school law. One pioneer expert, Daniel R. Hodgdon of New York University, argued that in fact court decisions revealed a governing social philosophy that lawyers and school officials needed to recognize. Its governing principle was, he said, that "the public school exists as a State institution simply because the very existence of civil society demands it. Education formulated by the State is not so much a right granted pupils as a duty imposed upon them for the public good." This stern view of the police power of the state in relation to individual rights permeated the early school law texts. By and large, their authors took as their premise that the purpose of the study of school law was to prevent litigation or at least insure that school authorities won their cases.[49]

The principles of organization of the traditional school law texts mirrored the bureaucratic concerns of the administrators and the focus on case precedent of the school lawyers. Using court decisions as the primary and often the sole body of evidence, the textbook writers discussed legal relations of the different levels of government, contracts, finances, tort liability, employment and dismissal of staff, school attendance, pupil transportation, and related matters. Broad issues of

constitutional rights seemed anomalous in such a mode of thinking; thus it is not surprising that authors often treated religious controversy as a problem of curriculum or racial segregation as a question of pupil assignment to schools. The courts were seen as interpreters of vague clauses in statutory law or the limits of administrative discretion, clearing away ambiguities so that educators could get about their real business: orderly instruction. The informed administrator supposedly used his knowledge of school law as one tool in the armamentarium of rational decision-making.[50]

To compare such school law texts with recent scholarship is to enter a new world of assumptions about the relation of law to education. The older authors seem to these scholars to be looking through the wrong end of the telescope. The new approach stresses the connections between broad social forces, the schools as complex institutions in flux, and fundamental issues of constitutional rights. The 1974 text Educational Policy and the Law by David L. Kirp and Mark G. Yudof, for example, examines how basic social and educational problems became legal issues, drawing on studies by historians and social scientists to plot the demands on the legal system and to demonstrate how law reflected social change. They organize the book according to basic issues of educational policy rather than the older bureaucratic-legal categories, stressing such matters as "student and teacher liberty," racial and sexual equality, the relation between school resources and outcomes,

and new concepts of equal educational opportunity and classification.[51]

Recent changes in legal scholarship have reflected major transformations in the society since Brown and in its public schools. The cleavages of race, religion, sex, class, and ethnicity -- once papered over by gentlemen's agreements among the powerful -- could no longer be neglected, for newly aroused groups among the governed refused their consent to such agreements. A new era of legal activism began.

4. Challenges to Business as Usual: Law and Public Education after 1954

Americans have used law in a variety of ways in creating and reshaping their public schools: to exhort local citizens to action, to enforce mainstream cultural values on outsiders, to standardize schools according to "scientific" specifications, to conduct the ordinary business of education in a commercial-industrial society, to protest, to gain entitlements. The list could go on. The problems of implementation and compliance are not new, nor are complaints over hyperactive use of the law. But today amidst a furor over litigiousness and over-regulation it is easy to forget the injustices of the old legal order and to fail to ask why the legal transformation of the last generation took place.

If one went back to the early 1950s, one would find less litigiousness than today, fewer and less complex federal and state regulations, and more acceptance of the authority of educational officials. One would also find legal segregation of

the races in the southern half of the nation, legal compulsory religious exercises in a multitude of school districts, legal sex-based discrimination, gross inequities in the funding of schools between districts and within districts, systematic favoring of middle-class and prosperous students, and pervasive lack of due process in the treatment of pupils' rights and in the relations between administrators and teachers.[52]

As James Coleman (in an earlier incarnation in 1967) explained, school governance in local districts was typically "dominated by the property-owning classes, including the social and business elite of the community. . . . an oligarchy among whose members there is more consensus than conflict." Such power wielders were naturally loath to share power in an educational system that preserved their advantages. When low-power protest groups pressed their demands for basic social change, therefore, they tended to appeal not to local oligarchs but rather to outside agencies for redress: to the courts, to state and federal legislatures, and to prosperous liberals in the churches, foundations, and national voluntary groups like the NAACP. There was a strong interaction between movements for social justice and the law, with influences going both ways. The Brown decision, for example, gave heart to civil rights groups, while black protest in South and North stimulated new court orders and legislation.[53]

One social movement after another mobilized members and broad public support for social change in the 1960s and early 1970s. Blacks, women, Hispanics, the handicapped, native

Americans, and many others sought greater equality in education, while public interest lawyers translated their demands into claims to which activist judges could respond. Federal and state legislatures also passed landmark statutes like the Civil Rights Acts, Title I of ESEA, and laws on multicultural education, bi-lingual instruction, and the handicapped. The gains were both symbolic and tangible. Ethnic groups sought equality of dignity, a legitimation denied by earlier attempts to define American values in a culturally exclusive manner. In effect, symbolic legislation about multi-ethnic curricula declared that pluralism of culture was also American. They also won increased funding for their schools, new jobs for minority staff, and new entitlements.

Not all landmark court cases reflected the influence of social movements, but taken together the cases added up to a legal revolution and revealed the impact of protest stemming from the larger society. Increasingly, the Supreme Court has demanded that educational policy respect the constitutional separation of church and state through the Bible and prayer decisions; questioned some assumptions behind compulsory attendance in Yoder; demanded greater attention to non-English-speaking students in Lau; pressed desegregation in many cases; and upheld student rights to due process and free expression. The number of federal cases increased dramatically:

1946-56:	112
1956-66:	729
1966-76:	1273

State courts, as well, treated basic questions of equity, as in the school finance cases.[54]

In their study of legalization of policy-making in California, Griffin and Jensen show not only the absolute increase in court cases but also important shifts in the issues litigated during the last generation. In the 1960-79 period personnel, tort, and fiscal and governance questions continued to constitute the bedrock of cases, but new issues of individual rights, labor relations, school finance, and school desegregation have arisen, often pressed by public law organizations in class action suits. Increasingly suits have been brought against state officials and educational administrators to enjoin them to alter educational policies. Legal principles have increasingly been evoked as a source of authority in education and other traditional forms of authority, such as professional expertise and local majority rule, have been questioned. One result has been an increased centralization in policy-making, but it is an incomplete and often confusing form of centralization not fully incorporated into standard operating procedures.[55]

As David Kirp has observed, judges have been ambivalent about their powerful new roles in public education. Many have believed themselves lacking in both the expertise and time to supervise the very changes which court decisions required in public schooling. Some observers have seen activist judges as heroes of social justice, while others have condemned an "imperial judiciary" for exceeding its proper scope. In fact, as Kirp notes, "many of the questions of equal educational opportunity presented for judicial resolution strain, in one way or

another, the competence of the courts." Court decisions and legislation have worked in tandem in securing changes in educational policies and practices, and many aggrieved groups such as the handicapped, women, and non-English speaking citizens may have won more pervasive reform through legislatures than through litigation. Kirp argues that "the primary effect of judicial involvement in defining equal educational opportunity may well lie not in court-defined resolution of these questions, but more nebulously in the judicial impetus for an essentially political solution, with courts affording new legitimacy to particular equity-based concerns."[56]

For their part, school officials have had mixed reactions toward the new legal activism. Not surprisingly, they have often been bothered by the decline in judicial deference toward school authorities in student rights and due process decisions and by the increase in procedural regulations affecting their everyday work. Accustomed to dealing with local elites in the 1950s, school superintendents found themselves confronted in the 1960s with angry minorities and other aggrieved groups who took to the courts to gain equality. New court decisions, civil rights legislation, and federal and state regulations seemed to complicate school administrators' lives at the very time that schools were being asked to do their regular work of instruction more efficiently.[57]

But educators also have been historically committed to certain visions of equality. In the nineteenth century reformers

conceived of equality mostly as free and open access to public schools. The administrative progressives added a new and complicated dimension -- equality of opportunity -- while believing themselves the best judges of how to achieve that goal. Many of the court decisions and legislative reforms of the last generation can be understood within those two traditional concepts of equality. One could argue that what groups like blacks, or the handicapped, or women really wanted was equality of access and equality of opportunity -- in short, to have public education fulfill the promise of the common school. Educators could deny that goal only by denying their own best ethical heritage.

The history of law in education in the last generation has thus been one of both continuity and change. New groups have demanded that the old ideals of the common school should include them. Older notions of normative dominance -- whether un-self-conscious or deliberate -- have given way to a new pluralism of values in which equality of dignity has been a goal of excluded groups. Codification of the one best system through law under the guidance of professional experts has been replaced by a plethora of new regulations and overlapping agencies so complex that Rube Goldberg himself could not map the lines of force or master the levers. Legislation and court decisions -- always in tension -- now have produced the perplexing kind of legalization that is the subject of this book. The strains on the educational system today are formidable, but in large part the present conflicts stem from attempts to remedy injustices for some when justice for all was a dream too long deferred.

APPENDIX: USING LEGAL CASE DIGESTS IN HISTORICAL ANALYSIS

by Aaron Benavot, Jill Blackmore, Karen Harbeck and Susan Looper

In the preceding text, Table 1 and Figure 1 represent part of an ongoing foray we are conducting into the changing character of litigated issues in education. We thought it would be helpful to describe how we conducted our quantitative analysis because we think that legal case digests can be a useful historical source in studying the relationship of law and society. Although case digests cover only reported cases, they provide a fairly sound basis upon which to raise questions and formulate ideas. We recognize the need to supplement this source with more detailed court records and other materials to gain a fuller sense of how representative were the appellate cases. This would also add to our understanding how legal processes differed by time and place.

American case-law has a long and rather elaborate history of indexing, cross-referencing and classification. A turning point in this systematization occured late in the nineteenth century when lawyers working for the West Publishing Company sought to compile and classify all cases reported in state and federal law reporters. The result, a unified classification scheme known as the American Digest System, became the standard reference for the legal profession after its adoption by the American Bar Association in 1898.

In our study we used the Centennial Digest, the first nationwide digest of state and federal cases, which spans some fifty volumes and includes over a half million cases decided between 1658 and 1896. Since

the first edition was issued, eight subsequent decennial editions based upon the Digest System have been published. (In our continuing work we intend to use these decennial editions as an additional source for understanding long-term historical trends.) Our present research employed the categories devised by the original compilers under the general rubric called "Schools and School Districts." Under this heading they had listed eight major legal categories and 43 subcategories as a basis for classifying the over 3000 court appellate cases decided during this period (see Table A). For each case indexed, we coded three pieces of information: (1) the year of litigation; (2) the state in which the case occured; and (3) the type of legal issue raised by the litigating parties. What we— and the original compilers-- have been interested in are the type of <u>issues</u> that have been litigated. As the coding progressed, we found that some <u>cases</u> were indexed in more than one category of legal <u>issues</u>. In other words, the digest references both cases dealing with a single issue as well as those dealing with multiple issues. Thus the unit of analysis in Figure 1 and Table 1 is not individual cases but rather litigated issues. Because the latter was our chief concern, duplication of cases was not a major conceptual problem.

We were interested, nonetheless, in estimating the degree to which cases were cited more than once. Accordingly, we made an exploratory study to discover how many cases were cross-referenced more than once <u>within</u> each of the eight major categories on the one hand and <u>across</u> all categories on the other. Our non-random sample of litigated issues

found that within categories about one case in seven (15.1%) dealt with more than one issue and was thus cited twice (see Table B). Our estimate of cross-referencing across all categories was slightly higher (about 20 to 23 percent). This investigation provided rough parameters of the degree to which court cases in education were multi-issue rather than single issue in character.

With this in mind, we can turn to discuss how Table 1 and Figure 1 were constructed. Upon completing our coding of the Centennial Digest, we reclassified the 43 subcategories into three substantive areas: finance, governance and "other." Our grouping of the various subcategories is noted in the last column of Table A. We then looked at the distribution of litigated issues for the three areas we had constructed at different intervals in the 19th century. In this way, we demonstrated the tendency of litigated educational issues to be financial or administrative in character throughout the period.

It should be mentioned that if we were to restrict our attention to only independent, single-issue cases, the relative importance of financial/governance issues would decline somewhat. This would hold if the number of multi-issue cases in the finance and governance categories is, as indicated in Table B, greater than those in the "other" category. In either case, this would not substantially alter the proposition found in the Tyack article that "throughout American history, the bedrock of cases probably continued to consist of traditional fiscal, contractual and governmental issues...."

In Figure 1, we changed our focus from the types of litigated issues

to whether certain regions in the country tended to have greater rates of litigation than others and whether certain historical patterns in these rates could be discerned. Our measure, the degree of educational litigiousness, was constructed by taking the total number of litigated issues per decade for a region and dividing by the average population during the decade for that region.[1] Although the average rates of litigation for the whole country generally rose during the 19th century (from about 2 issues per million population to over 15 issues), the most dramatic rise took place, as might be expected, in the 1840's after the onset of the common school crusade. Most revealing, however, is the variation found in the rates of litigation by region.

The early and intense number of issues litigated in the New England region during the 1840's and 1850's appears to have set basic standards for establishing school systems in other parts of the country. The overall effect of the legal activity around mid-century was to decrease the rate, though not the pattern, of educational litigation as the movement to institutionalize a system of compulsory schooling moved West and South across the country. Figure 1 suggests that the kinds of issues litigated in New England courts during the common school movement set legal precedents for establishing school systems throughout the country.

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[1]The regional breakdown follows standard census categories with two exceptions: 1) The South Atlantic, East South Central and West South Central regions have been collapsed into the "South" region; and 2) Mountain and Pacific regions are referred to as the "West."

Our exploratory investigation clearly raises as many questions as it answers. For example, why the relatively high rates of litigation in the rural Mid-western states as compared to the industrial ones, and why the relative lack of litigation in the populous Middle Atlantic states such as New York and New Jersey? Careful analysis of court records will undoubtedly provide new and more complete material to answer these questions. All in all, we are convinced that the type of research strategy we describe in this appendix highlights the historical value of legal case digests and suggests new ways of studying historical patterns in the relationship of law and society.

Table A: List of Major Categories and Subcategories Found in the Century Digest under the Topic "Schools and School Districts" and Their Reclassification

Legal Categories Used in the Century Digest	Reclassified Topics
1. Establishment and Regulation of School lands and funds	
A. Establishment and maintenance	Governance
B. School lands	Finance
C. School funds	Finance
D. Regulation and supervision of schools	Governance
2. Creation and Alteration of School Districts	
A. Incorporation and organization	Governance
B. ALternation and creation of new districts	G
C. Adjustment of pre-existing rights and liabilities	G
D. Union or annexation of districts	G
E. Enumeration of children for school purposes	G
F. Dissolution of districts	G
3. Government, Officers and District Meetings	
A. Administration of school affairs	Governance
B. State boards and officers	G
C. County boards and officers	G
D. Officers of towns	G
E. District meetings in general	G
F. District boards	G
G. Criminal responsibilities and penalties	G
4. District Property, Contracts and Liabilities	
A. Acquisition and use of property	Finance
B. School buildings	F
C. School furniture, etc.,	F
D. Contracts	F
E. District expenses and statutory liabilities	F
F. Torts	F
5. District Debt, Securities and Taxation	
A. Power to incur indebtedness	Finance
B. Administration of Finances	F
C. Bonds and other securities	F
D. School taxes	F
E. Assessments and special taxes	F
F. Poll taxes	F
G. Disposition of taxes and other revenue	F
H. Rights and remedies of taxpayers	F
6. Claims against District and Actions	
A. Presentation and allowance of claims	Governance
B. Actions by or against district	G
7. Teachers	
A. Eligibility	Other
B. Selection and appointment	Other
C. Contracts of employment	Finance
D. Removal and discharge	Other
E. Compensation	Finance
F. Duties and liabilities	Other
8. Pupils	
A. Admission and pupil attendence	Other
B. School terms, pupil classification and instruction	Other
C. Control of pupils and discipline	Other

Table B: Estimation of the Degree of Cross-referencing within Each of Eight Major Legal Categories for 19th Century Educational Litigated Issues

Major Legal Category	Number of Actual Issues in Category	Number of Sampled Issues	Percent of Sampled Issues Refering at least Once to same Case
1. School Lands, School Funds	226	38	2.6
2. Organization of School Districts	495	112	15.9
3. Government and Officers	635	111	21.6
4. District Property & Liabilities	353	79	15.2
5. District Debt & Taxation	768	229	16.6
6. Claims Against District	124	35	14.3
7. Teachers	387	35	0.0
8. Pupils	195	30	6.7
Totals	3183	669 (21.0%)	15.1%

1. W. H. Auden, "Law like Love," in Maynard Mack, Leonard Dean, and William Frost, eds., Modern Poetry (Englewood Cliffs, N.J.: Prentice-Hall, 1961), 194.

2. A classic school law textbook is Newton Edwards, The Courts and the Public Schools (Chicago: University of Chicago Press, 1971 -- also issued in 1933 and 1955).

3. Lawrence M. Friedman, The Legal System: A Social Science Perspective (New York: Russell Sage Foundation, 1975), 15; Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973); James Willard Hurst, Law and Social Order in the United States (Ithaca: Cornell University Press, 1977); David L. Kirp and Mark G. Yudof, Educational Policy and the Law: Cases and Materials (Berkeley: McCutchan Publishing Corporation, 1974; new edition forthcoming); Harry H. Scheiber, "American Constitutional History and the New Legal History: Complementary Themes in Two Modes," Journal of American History, 68(1981), 337-50.

4. Jethro K. Lieberman, The Litigious Society (New York: Basic Books, 1981); Nathan Glazer, "Toward an Imperial Judiciary?" The Public Interest, 41(1975), 104-23; for observations on the creation of continuity I am indebted to Tom James; for analysis of the relation between law and behavior, see Harry S. Lufler, Jr., "Compliance and the Courts," in David C. Berliner, ed., Review of Research in Education (vol. 8; Washington, D.C.: AERA, 1970), 336-59.

5. David Tyack and Elisabeth Hansot, "Conflict and Consensus in American Public Education," Daedalus, 110(Summer 1981), 1-25; Carl F. Kaestle, "Conflict toward a Reinterpretation of American Educational History," Harvard Educational Review, 46(1976), 390-96.

6. Subsequent footnotes document the historical argument: for two recent studies of law and educational policy see: Clifford P. Hooker, ed., The Courts and Education (77th Yearbook of the National Society for the Study of Education; Chicago: University of Chicago Press, 1978); Ray C. Rist and Ronald J. Anson, eds., Education, Social Science and the Judicial Process (New York: Teachers College Press, 1977).

7. David Tyack and Elisabeth Hansot, Managers of Virtue: A History of Leadership in American Public Education, 1820-1980 (New York: Basic Books, 1982), Part 1.

8. Lawrence Kotin and William F. Aikman, Legal Foundations of Compulsory School Attendance (Port Washington, N.Y.: Kennikat Press, 1980), 420-33; Jesse K. Flanders, Legislative Control of the Elementary School Curriculum (New York: Teachers College, 1925), 158-59.

9. See, for example, State of California, Revised School Law (Sacramento: O. M. Clayes, 1866); J. W. Holcombe, ed., The School Law of Indiana (Indianapolis: Wm. R. Burford 1883); James Blodgett, Report of Education in the United States at the Eleventh Census (Washington, D.C.: GPO, 1893), introduction; United States Commissioner of Education, Report for 1888-89 (Washington, D.C.: GPO, 1889), ch. 18, 79-139.

10. Arthur C. Logan, Ninth Annual Report of the Superintendent of Public Instruction for the Year 1887, and the School Laws of the Territory of Montana (Helena, Montana: Independent Printers, 1887), 6, 36-37.

11. S. R. Thompson, comp. The School Laws of Nebraska (Lincoln, Neb.: Nebraska Journal Company, 1877), back cover.

12. On the pattern of school founding in the North, see Tyack and Hansot, Managers, 28-34, 44-63; on the South, ibid, 83-93.

13. Cummings v. Missouri, 4 Wall. 277 (1876) concerning a loyalty oath was the exception (unless one also excludes the case of Dartmouth College v. Woodward, 4 Wheat . 518 (1819) which guaranteed the sanctity of contract); private school cases listed in West's Centennial Digest showed the same preoccupation with fiscal and governance issues (only 3 of 19 cases dealt with pupils).

14. Lawrence M. Freedman, "Notes toward a History of American Justice," in Lawrence M. Friedman and Harry N. Scheiber, eds., American Law and the Constitutional Order: Historical Perspectives (Cambridge: Harvard University Press, 1978), 19-20; Nevada official quoted in John F. Bender, The Functions of Courts in Enforcing Compulsory School Attendance Laws (New York: Teachers College, 1927), 10.

15. Uhlman S. Alexander, Special Legislation Affecting Public Schools (New York: Teachers College, 1929), 10, 5-6, 45, 52, 15, 17, 26, 110-12.

16. David Tyack, "The Tribe and the Common School: Community Control in Rural Education," American Quarterly, 24(1972), 3-19.

17. Everett Dick, The Sod-House Frontier (New York: D. Appleton-Century, 1937), ch. 6; John Miller to Oliver Applegate, June 21, August 15, 1863, O. C. Applegate Papers, University of Oregon; Clifton Johnson, Old-Time Schools and Schoolbooks (New York: Dover, 1963), 102.

18. Friedman, "American Justice," 21-24; Walter Lippman, American Inquisitors: A Commentary on Dayton and Chicago (New York: Harper & Row, 1928).

19. Robert Wiebe, "The Social Functions of Public Education," American Quarterly, 21(1969), 147-64.

20. Paul Kleppner, The Cross of Culture: A Social Analysis of Midwestern Politics, 1850-1900 (Chicago: University of Chicago Press, 1970); John W. Meyer and James G. Roth, "A Reinterpretation of American Status Politics," Pacific Sociological Review, 13(1970), 95-102; Joseph R. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement (Urbana, Ill.: University of Illinois Press, 1963), chaps. 1, 6, 7.

21. Robert G. McCloskey, ed., The Bible in the Public Schools: Arguments before the Superior Court of Cincinnati in the Case of Minor v. Board of Education of Cincinnati, 1870 (New York: Da Capo Press, 1967), 213; David Tyack, "Onward Christian Soldiers: Religion in the American Common School," in Paul Nash, ed., History and Education: The Educational Uses of the Past (New York: Random House, 1970), 212-55.

22. Otto T. Hamilton, The Courts and the Curriculum (New York: Teachers College, 1927), 113.

23. Donald E. Boles, The Bible, Religion, and the Public Schools (New York: Collier Books, 1963), 53; Flanders, Legislative Control, 155.

24. Dinah Shelton, "Legislative Control over Public School Curriculum," Willamette Law Review, 15(1979), 485; Flanders, Legislative Control, 66-67, 71-72; Gusfield, Symbolic Crusade.

25. Shelton, "Legislative Control," 481; Flanders, Legislative Control, 40-41; Leon F. Edelman, "Basic American," NOLPE School Law Journal, 6(1976), 92-95.

26. Shelton, "Legislative Control," 483; Flanders, Legislative Control, 8-12.

27. Shirley Brice Heath, "Language and Politics in the United States," in Muriel Saville Troike, ed., Georgetown University Round Table on Languages and Linguistics (Washington, D.C.: Georgetown University Press, 1977), 267-96; Flanders, Legislative Control, 8-9; Shelton, "Legislative Control," 480, footnote 30.

28. Meyer v. Nebraska, 262 U.S. 390, (1923), 394, 401, 402.

29. Ibid.

30. Oregon School Cases: Complete Record (Baltimore: Belvidere Press, 1925), 732; David Tyack, "The Perils of Pluralism: The Background of the Pierce Case," American Historical Review, 74(1968), 74-98.

31. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

32. Minersville School District v. Gobitis 310 U.S. 586 (1940); Kirp and Yudof, Policy and Law, 134-37; Evelyn R. Fulbright and Edward C. Bolmeier, Courts and the Curriculum (Cincinnati: W. H. Anderson Company, 1964), 70-77.

33. West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943).

34. Tyack and Hansot, Managers, part 2.

35. Dean Russell quoted in Flanders, Legislative Control, iii.

36. Carter Alexander, "Can a School Executive Afford to Ignore the Law?" Nation's Schools, 9(1932), 29.

37. Ellwood P. Cubberley, State and County Educational Organization: The Revised Constitution and School Code of the State of Osceola (New York: The Macmillan Company, 1922), vi-vii.

38. Ibid., vii; for criticisms of Cubberley for being overspecific, see Glen W. Caulkins, "A Proposed Criterion for Evaluating State Schools Laws," Nation's Schools, 14(1934), 29.

39. William G. Carr, "School Legislation as a Factor in Producing Good Schools," American School Board Journal, 81 (1930), 37; George M. Baker, "Comparative School Law," Kentucky Law Journal, 5(1917), 30-41.

40. Madaline Kinter Remmlein, "Statutory Problems," Law and Contemporary Problems, 20(1955), 125-37.

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42. George J. Collins, The Constitution and Legal Basis for State Action in Education (Boston: Massachusets Department of Education, 1968), 30-32; Edith Lathrop, The Improvement of Rural Schools by Standardization (Washington D.C.: GPO, 1925), 10-13.

43. Charles H. Judd, "Federal Department of Education," American Bar Association Journal, 7(1921), 63-64; William D. Guthrie, "Federal Government and Education," Ibid., 14-16.

44. John C. Hogan, The Schools, the Courts, and the Public Interest (Lexinton, Mass.: Lexington Books, 1974), 7, chapter 2; M. M. Chambers, ed., The Fifth Yearbook of School Law (Washington, D.C.: American Council on Education, 1937).

45. Thomas M. Griffin and Donald N. Jensen, "The Legalization of State Educational Policymaking in California," Institute for Research on Finance and Governance, Stanford University, 1981, 11.

46. Ibid., 6-8; Daniel R. Hodgdon, "School Law," Nation's Schools, 36(1932), 571-73; M. M. Chambers, "Our Developing School Law," Nation's Schools, 18 (1936), 29-31; Educational Research Service, NEA, State School Legislation, 1934 (Circular No. 3, 1935, (Washington, D.C.: NEA, 1935); William H. Hood, "Review of Educational Legislation, 1917 and 1918," U.S.O.E., Biennial Survey of Education (Washington, D.C.: GPO, 1921), I, 491-526.

47. E. C. Bolmeier, "Legal Issues in School Transportation," Law and Contemporary Problems, 20(1955), 45-59; Earl W. Anderson, The Teacher's Contract and Other Legal Phases of Teacher Status (New York: Teachers College, 1927).

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50. Harvey Cortlandt Vorhees, The Law of the Public School System of the United States (Boston: Little, Brown, and Company, 1916; Trusler, School Law, preface; Editorial "Education Jurisprudence," Nation's Schools, 2(1927), 72; Robert L. Drury, Law and the School Superintendent (Cincinnati, W. H. Anderson, 1958).

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52. Keith Goldhammer, "Roles of the American School Superintendent," in Luvern L. Cunningham, Walter G. Hack, and Raphael O. Nystrand, ed., Educational Administration: The Developing Decades (Berkeley, CA.: McCutchan Publishing Company, 1977), 148, 150-51; Tyack and Hansot, Managers,

part 3; on the lack of due process see H. Thomas James, "Educational Administration: A Forty-Year Perspective," (Division A, Invited Address, AERA Convention, New York, April, 1981).

53. James S. Coleman, "The Struggle for Control of Education," ERIC Report Resume ED 015 158, October 7, 1967, 5-6, 7, 8.

54. David L. Kirp, Just Schools (Berkeley, CA: University of California Press, forthcoming); Hogan, Courts, 7, chapters 2-4.

55. Griffin and Jensen, "Legalization," 19-28; John W. Meyer, "Organizational Factors Affecting Legalization in Education," Institute for Finance and Governance, Stanford University, 1981.

56. David L. Kirp, "Law, Politics, and Equal Educational Opportunity: Reflections on the American Experience,"

57. For an excellent review of new literature on governance see William L. Boyd, "The Public, the Professionals," and Educational Policy Making: Who Governs?" Teachers College Record, 77(1976), 539-77.